No. 42881-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Clark,

Appellant.

Lewis County Superior Court Cause No. 11-1-00449-4

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

This issue will likely be controlled by the Supreme Court's decision in State v. Sublett, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). The Court heard oral argument in Sublett in June of 2011; presumably, a decision will be issued in the near future. Accordingly, Mr. Clark rests on the argument set forth in the Opening Brief.

II. MR. CLARK WAS ENTITLED TO INSTRUCTIONS ON THE INFERIOR-DEGREE OFFENSE OF THIRD-DEGREE ASSAULT OF A CHILD.

The trial court must instruct on an inferior degree offense if, when viewed in a light most favorable to the instruction's proponent, the evidence suggests that only the lesser offense was committed. State v. Fernandez-Medina, 141 Wash.2d 448, 455-456, 6 P.3d 1150 (2000). Here, the trial court made an error of law in rejecting Mr. Clark's proposed instructions on third-degree child assault. In particular, the court ignored the fact that criminal negligence—an element of the lesser charge—can be established by reckless, knowing, or intentional conduct. See RP (10/26/11) 40; RCW 9A.08.010(2).

Thus, a person is guilty of third-degree assault of a child if s/he intentionally, knowingly, recklessly, or with criminal negligence inflicts substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(f). Respondent's argument does not address this: according to Respondent (and the trial judge), Mr. Clark was required to show that "he was acting with criminal negligence to the exclusion of recklessness..." Brief of Respondent, p. 19.

This is incorrect. The Workman test requires some evidence that the accused person committed the lesser offense to the exclusion of the greater—not that the accused person had particular mens rea required for commission of the lesser offense without reference to the substitutions permitted under RCW 9A.08.010(2). See State v. Workman, 90 Wash.2d 443, 584 P.2d 382 (1978).

The differentiating factor here is not the mens rea; rather it is the degree of harm inflicted. There was at least some evidence that Mr. Clark intentionally struck Q., and thereby caused "bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering..." RCW 9A.36.031(1)(f). The evidence thus supported an inference that Mr. Clark was guilty of third-degree assault of a child: proof of an intentional assault satisfies the requirement of an act done with criminal negligence. RCW 9A.08.010

The other requirement under Workman is that some evidence supports the lesser offense to the exclusion of the greater. This requirement is met here as well: the evidence—when taken in a light most favorable to Mr. Clark—suggested that he was not guilty of second-degree assault of a child.

The instructions outlined four different alternative means of committing second-degree assault of a child. The first—upon which Respondent primarily relies—is the infliction of "substantial bodily harm," which includes "a temporary but substantial disfigurement." CP 35; see Brief of Respondent, pp. 22-23. Respondent seems to argue that the bruising Q. suffered qualified as substantial bodily harm as a matter of law. Brief of Respondent, pp. 22-23 (citing State v. Ashcraft, 71 Wash.App. 444, 859 P.2d 60 (1993)). Respondent is incorrect.

Ashcraft was a sufficiency case, in which the evidence was taken in a light most favorable to the state. Ashcraft, at 454-455. Here, by contrast, the evidence must be taken in a light most favorable to Mr. Clark. Fernandez-Medina, at 455-456. No published opinion equates bruising with substantial bodily harm as a matter of law. Furthermore, taking the evidence in a light most favorable to Mr. Clark, the jury was entitled to believe that some or all of Q.'s bruises resulted from a fall after jumping on the bed, and that Mr. Clark's intentional assault caused only minor

(insubstantial) disfigurement. See, e.g., RP (10/25/11) 127-128; 134-136 (testimony of Dr. Hall). In other words, jurors were entitled to decide that Mr. Clark did not cause all of the bruising, and/or that Q.'s injuries did not amount to "substantial bodily harm."

Respondent mentions the second alternate means, but does not point to any evidence establishing that pain or agony equivalent to torture was inflicted "by design," as required under RCW 9A.36.021(1)(f). Brief of Respondent, p. 23. Even if Mr. Clark intentionally assaulted Q., he could have done so without the intent to inflict the level of pain necessary to satisfy RCW 9A.36.021(f). Furthermore, jurors were entitled to decide that the evidence—when taken in a light most favorable to Mr. Clark—showed that any pain inflicted upon Q. was not equivalent to torture. As noted above, jurors might also have believed that Q.'s injuries resulted from a combination of events, including the jumping on the bed.

Similarly, Respondent fails to adequately address the third alternate means. Brief of Respondent, p. 3. Taking the evidence in a light most favorable to Mr. Clark, jurors were entitled to believe his testimony that he did not choke Q., even if they thought he intentionally hit or slapped Q. RP 30-31. Under the Workman standard, this testimony is sufficient to exclude the third alternate means of the greater offense. Fernandez-Medina, at 455-456.

Finally, Respondent's argument regarding the fourth alternative cannot succeed. Brief of Respondent, p. 24. Even if jurors believed that Mr. Clark engaged in a pattern or practice of abuse, they were entitled to conclude that any prior assaults did not cause "bodily harm that was greater than transient physical pain or minor temporary marks." RCW 9A.36.130(1)(b); CP 31.

Throughout Respondent's argument, two themes emerge: (1) that Mr. Clark was not criminally negligent, and (2) that the evidence was sufficient to convict of the greater charge. Brief of Respondent, pp. 18-24. These themes illuminate the flaws in Respondent's reasoning. The first theme is incorrect because Mr. Clark was not required to show that he was criminally negligent, given that an intentional assault can substitute for criminal negligence under RCW 9A.08.010. The second theme is incorrect because sufficiency of the evidence supporting the greater offense is irrelevant: under Workman, the evidence is to be taken in a light most favorable to the accused person.

The evidence—when taken in a light most favorable to Mr. Clark—suggested that he committed only the inferior offense, to the exclusion of the greater. Accordingly, the court should have instructed the jury on the inferior offense. Fernandez-Medina, 455-456. Mr. Clark's

conviction must be reversed. State v. Parker, 102 Wash.2d 161, 164, 683 P.2d 189 (1984). The case must be remanded for a new trial. Id.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE ONE ALTERNATIVE MEANS SUBMITTED TO THE JURY.

The right to a unanimous verdict includes the right to jury unanimity on the means of committing the crime. State v. Lobe, 140 Wash. App. 897, 903-905, 167 P.3d 627 (2007). No special verdict (specifying the means of commission) is required unless the evidence is insufficient to support one of the alternatives submitted to the jury. State v. Ortega-Martinez, 124 Wash.2d 702, 707-708, 881 P.2d 231 (1994).

Here, the evidence was insufficient to prove that Mr. Clark had "previously engaged in a pattern or practice of assaulting [Q.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks." CP 31; see also RCW 9A.36.130(1)(b). No evidence suggested that any prior assaults caused more than transient pain or minor temporary marks. RP (10/25/11) 31, 50, 87.

Respondent concedes that there was no evidence that Mr. Clark had previously caused marks of any kind. Brief of Respondent, p. 29. Nor does Respondent suggest that Q.'s statements directly describing pain that was greater than "transient physical pain." Brief of Respondent, p. 29. In the absence of direct evidence, Respondent cites circumstantial evidence

suggesting that Mr. Clark had, in the past, inflicted some degree of pain. Brief of Respondent, p. 29. However, the circumstantial evidence does not show that any pain suffered by Q. was more than "transient physical pain," as required by RCW 9A.36.130(b).

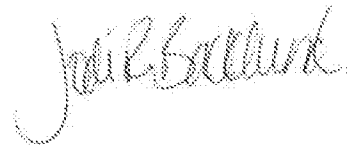
The evidence was insufficient to establish one of the alternative means submitted to the jury. Because there was no special verdict, Mr. Clark was denied his constitutional right to a unanimous jury. Lobe, supra. His conviction must be reversed and the case remanded for a new trial. Id.

CONCLUSION

Mr. Clark's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on August 17, 2012,

BACKLUND AND MISTRY



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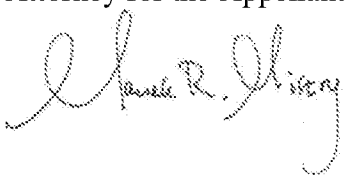

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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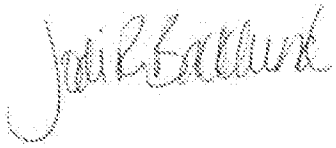
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 17, 2012.



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